

United Mine Workers of America, Local Union No. 8217 (The Powellton Company) and Ernest T. Hale. Cases 9-CB-4807 and 9-CB-4898

13 July 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 30 November 1982 Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that the Regional Director had properly reinstated previously withdrawn charges outside the 6-month limitations period of Section 10(b) of the Act.

In our recent Decision in *Winer Motors*, 265 NLRB 1457 (1982), we held that Section 10(b) bars the General Counsel from reinstating a withdrawn charge more than 6 months after the alleged misconduct occurred. In so doing, we overruled *Silver Bakery*, 150 NLRB 421 (1964), on which the Administrative Law Judge had relied in finding that the charges had been properly reinstated. Therefore, we conclude, for the reasons fully set forth in *Winer Motors*, that the charges had been untimely reinstated.¹ Accordingly, we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

For the reasons fully set forth in the dissenting opinions in *Winer Motors*, 265 NLRB 1457 (1982), I would find that where equitable considerations so warrant, as here, a timely filed charge properly may be reinstated without contravening Section 10(b) of the Act.

¹ In agreeing that the complaint was untimely reinstated and thus should be dismissed, Member Hunter would not distinguish between charges that are withdrawn and those that are dismissed. See *Winer Motors*, *supra* at 1458, fn. 8.

In *Airport Connection*, 243 NLRB 1076, 1077 (1979), the Board held, citing both *Silver Bakery*, 150 NLRB 421 (1964), and *California Pacific Signs*, 233 NLRB 450 (1977), that "the Board will not overrule the General Counsel's decision to reinstate a timely filed charge unless Respondent can show that the equities of the case compel such a result." See also *Kennicott Bros. Co.*, 256 NLRB 11, 12 (1981). I continue to adhere to that principle in recognition of the broad authority conferred on the General Counsel in the issuance of complaints, pursuant to a timely filed charge, under Section 3(d) of the Act. Here, it is undisputed that the charges were timely filed in the first instance and were withdrawn only as a result of substantive errors in the Region's processing and the Charging Party's reliance on the erroneous representations of Board agents. As Respondent has failed to demonstrate, in these circumstances, that the equities compel overruling the General Counsel's reinstatement of the timely filed charges, I would, contrary to my colleagues, affirm the Administrative Law Judge's denial of Respondent's motion to dismiss the consolidated complaint.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: This case was heard in Logan, West Virginia, on July 13 and 14, 1982, on a complaint issued on April 1, 1982, based on charges filed by Ernest T. Hale, an individual.¹ The complaint alleges that United Mine Workers of America, Local Union No. 8217, herein called the Union or the Respondent, violated Section 8(b)(1)(B) of the National Labor Relations Act, as amended, herein the Act, by restraining and coercing the Powellton Company, herein the Company,² in the selection of that Company's representatives for the purpose of collective bargaining or the adjustment of grievances. The Respondent, in answering the complaint, denied the commission of unfair labor practices.

Issues

Whether the Respondent violated Section 8(b)(1)(B) of the Act with respect to Hale as mine foreman by:³

1. Threatening that, before the Respondent and the Company could resolve work problems at the mine, the Company would have to discharge Hale.

2. Threatening to summon mine inspectors each day to shut down the Company's mine unless Hale was terminated.

¹ The charges in Cases 9-CB-4807 and 9-CB-4898 were filed on January 27 and April 27, 1981, respectively.

² All dates hereinafter are in 1980 unless stated to be otherwise.

³ The answer admits and I find that, at all times material herein, Hale was a supervisor within the meaning of Sec. 2(11) of the Act and a representative of the Company for purposes of the adjustment of grievances within the meaning of Sec. 8(b)(1)(B) of the Act.

3. Threatening that production would be stopped and that no work would be performed or coal mined until the Company discharged Hale.

4. Implying the members of the Respondent were engaged in a work slowdown which would not end until the Company removed Hale as foreman.

5. Engaging in a strike to force the Company to discharge Hale.

6. Causing the Company to terminate Hale because of some or all of the above-alleged conduct.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, which have been carefully considered, were filed by the General Counsel and the Respondent.

Upon the entire record of this case⁴ and from my observation of the witnesses and their demeanor, I now make the following:

FINDINGS OF FACT⁵

I. JURISDICTION

The Powellton Company, a West Virginia corporation with an office and place of business in Mallory, West Virginia, is engaged in the mining and nonretail sale of coal. During the 12 months preceding issuance of the complaint, a representative period, the Company in the course and conduct of its business operations sold and shipped from its Mallory facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of West Virginia. I therefore find that, at all times material herein, the Company has been an

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

For many years, the Respondent was the duly recognized bargaining representative for the production and maintenance employees employed by The Powellton Company at its coal mines in and around Mallory, West Virginia. Terms and conditions of employment for these employees during the relevant period are set forth in the National Bituminous Coal Wage Agreement, effective March 25, 1978, through March 25, 1981, between the Bituminous Coal Operations' Association, Inc., and United Mine Workers of America, to which the Company and the Respondent subscribed.

The collective-bargaining agreement provided for a four-step grievance procedure following a strict, expedited time schedule, culminating, at the fourth step, in arbitration within 15 days of referral. The contract also established a mine committee to represent employees who invoke the grievance procedure.⁶ In accordance with the parties' stipulation at the hearing, I find that mine committee members, when serving in that capacity, are agents of the Respondent within the meaning of Section 2(13) of the Act.

The contract also made provision for a mine health and safety committee at each mine, whose members are charged with inspecting all areas and systems germane to the mine, and who receive and act on reports from employees on conditions affecting mine safety. The safety committee was charged with reporting defective conditions and with making pertinent recommendations to the employer. When that committee believed that an imminent danger existed, the employer was required to follow the safety committee's recommendation and remove employees from the involved area immediately. When the safety committee in closing down an area of the mine acted "arbitrarily and capriciously," the responsible committee member or members could be moved at the employer's initiative. However, where removal was contested, arbitration was required within 15 days. Where the other safety committee members so determined, the affected committeemen remained on the committee until decision by the arbitrator.⁷

⁴ The General Counsel's post-hearing motion that the transcript record of the hearing in this matter be corrected is granted.

⁵ At the hearing, based on *Kennicott Bros. Co.*, 256 NLRB 11, 12-13 (1981), and *Silver Bakery*, 150 NLRB 421, 424-426 (1964), enf. denied 351 F.2d 37 (1st Cir. 1965), I denied the Respondent's motion to dismiss the consolidated complaint. This motion contended, generally, that the charges herein had been improperly reinstated, in contravention of Sec. 10(b) of the Act, after the Board's Regional Office had solicited and approved their withdrawal on February 25 and June 2, 1981, respectively. The Respondent argued that Sec. 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board," bars present litigation of charges reinstated in March 1982, and which relate to alleged violations supposedly occurring during and before October 1980.

The record supports the General Counsel's position that the charge in Case 9-CB-4807 was timely filed on January 27, 1981, with respect to all allegations, that the April 27, 1981, charge in Case 9-CB-4898 was filed just less than 6 months from the day of Hale's discharge, and that the earlier withdrawals of these charges had been obtained and approved as a result of substantive errors in their processing, which are conceded by the General Counsel, with the result that Hale was denied his rights under the Act. Subsequently, after exchanges of correspondence with Senator Robert C. Byrd of West Virginia, whose assistance Hale had sought, and review of the investigative files, the Board's General Counsel directed reinstatement of the charges and issuance of the consolidated complaint herein.

The above-cited cases make clear that otherwise timely filed charges may be reinstated to revive liability where, as here, the Charging Party in requesting withdrawal had relied on the erroneous representations of Board agents. Also see *Airport Connection*, 243 NLRB 1076, 1077 (1979), where the Board rejected arguments against a similar reinstatement of charges. In that case, the respondent unsuccessfully contended that such action constituted an abuse of discretion and otherwise was precluded by principles of equitable estoppel.

⁶ The mine committee, as outlined in the contract, consists of three to five members at each mine who are employed at the mine where they serve, and who become involved in the grievance procedure during the second step. In the first step, the aggrieved employee makes his oral complaint to his immediate foreman. If there is no resolution, the grievance is submitted in writing and, in step two, members of the mine committee meet with the employer's representative. In step three, where applicable, the mine committee serves in an advisory capacity to the United Mine Workers district field representative who, at that phase, meets with management, and, as needed, at any subsequent arbitration.

⁷ As mine and safety committees had the same membership, they will be referred to collectively as the mine/safety committee.

During the first 10 months of 1980, when the events herein occurred, the Company operated four coal mines within the bargaining unit—Mines Nos. 11, 17, 15A, and 7B. Mine No. 11 is the only location relevant to this proceeding.

The Company's president at the relevant time was Hermann Zmoelnig. Burl Holbrook was vice president for administration and finance,⁸ George Viers was personnel relations manager, and Frank Holbrook, the safety director.⁹ From March 1 to October 31, Ernest T. (Red) Hale, the Charging Party, was mine foreman of Mine No. 11 in charge of its operations.

B. The Facts

1. Demands by the Respondent for Hale's removal and related threats

The General Counsel contends that the Respondent caused the Company to discharge Hale on October 31 from his position as mine foreman of Mine No. 11 because of frictions arising from or following his role in the removal of Roy Grimmert from the mine/safety committee, which difficulties culminated when Hale later became significantly involved in the Respondent's unsuccessful effort to discharge 25 Mine No. 11 employees because of their refusal to work. In support of this position, the General Counsel introduced testimony that certain members of the mine/safety committee, principally Clyde Bartrum, had demanded that Hale be removed or replaced, threatening, in the alternative, to take and/or to continue certain actions harmful to the Company.

The Respondent denies that its representatives had sought Hale's removal and asserts that the refusal of its members to enter beyond the certain point inside the mine, as charged, was based solely on the existence of dangerous conditions, rather than on a desire to make trouble for Hale.

Hale¹⁰ became foreman of Mine No. 11 on or about March 1 after Burl Holbrook, the Company's vice president, decided to transfer him to that position after a February 25 confrontation between the then-incumbent Mine No. 11 foreman, Sam Browning, and Clyde Bartrum, a mine employee on the first shift.¹¹ Personnel Relations

⁸ At the time of the hearing, Holbrook was executive vice president.

⁹ Frank Holbrook and Burl Holbrook are not related.

¹⁰ Hale, with many years of coal industry experience, had been with the Company in a variety of supervisory positions at different mines since May 1969. At the start of 1980, he was mine foreman in charge of the Company's Mine No. 7B, which had 3 foremen and approximately 18 employees. Mine No. 11, by comparison, employed 9 foremen and around 50 employees.

¹¹ The record shows that, in the absence of regular mine/safety committee members on the scene, Bartrum had been asked on February 25 to act as a mine committeeman by certain employees at Mine No. 11 in connection with a dispute that had arisen on the second shift. The first shift began work at 7:30 a.m. and the second shift at 4 p.m. Bartrum's authority to act as a committee member was confirmed by the Respondent's president, Jackie Barker, via telephone. Foreman Browning, however, when notified, had refused to recognize Bartrum as a mine/safety committeeman and ordered him off the premises as a trespasser. Bartrum's response, made in the presence of other employees, that Browning should shut up or they would fight was reported to the Company. There was no actual fight, but Bartrum was given a 5-day suspension with intent to discharge. Under the contract, employees cannot be terminated directly, but must follow the procedure used with Bartrum pending resolution or arbitration.

Manager George Viers testified that, after the arbitrator had ordered Bartrum's reinstatement, he attended a meeting with mine/safety committee representatives where the Respondent's president, Barker, had stated that the Company should remove Browning as no one could get along with him and as the men were having a lot of trouble with him. This was denied by Barker.

According to Viers, in selecting Hale as Mine No. 11 foreman, Vice President Burl Holbrook had emphasized that Hale was the Company's most experienced foreman, always had been a leader in production, and very seldom had had labor disputes. This testimony concerning Hale's prior record is not contradicted.

Hale testified that, around 4 p.m. on a day in late July or early August, Roy Grimmert,¹² a member of the mine/safety committee, reported that there was something wrong with the fan.¹³ Hale agreed to Grimmert's demand that the fan be checked out and named Section Foreman James Evans to accompany Grimmert and Grimmert's designee, miner Barry Brown, in inspecting the fan.

On their return, Evans declared that the fan seemed to be working satisfactorily, but Grimmert insisted that the fan needed either new bearings, a new fan belt, or new blades. Hale explained to Grimmert that Safety Director Frank Holbrook, in response to earlier complaints, had spent the entire previous day checking the fan and had found it to be working properly. However, Grimmert still was not satisfied and reiterated that the fan needed a belt, bearings, or blades. Hale then asked Union President Barker and Vice President Walter Toller to accompany him to the fan to make certain that it was all right. Toller, a longtime acquaintance, did not clearly answer Hale as to what was wrong with the fan, but suggested that Barker and himself go to the lamp house where the men had gathered to hear what they had to say.¹⁴

Barker and Toller later returned from the lamp house with Grimmert who advised Hale that the men were not going into the mine. Although Hale again proclaimed that the ventilating system was in good order and showed maintenance records for the fan, the men would not go to work.¹⁵ Accordingly, Hale called the shop and directed that the blades and/or fan belts be changed. These repairs were done between 5 and 7:30 p.m. While the work was in progress, the men started to leave for home and, by the time work on the fan was completed, not many men remained on the premises. When Hale re-

tration. On March 17, the arbitrator reduced Bartrum's penalty to suspension for 10 days without pay and returned him to work.

¹² Grimmert was employed at the mine as an electrician on the second shift, which then was scheduled to start work.

¹³ The fan is a large sophisticated mechanism used to ventilate the entire mine, with outlets at the face where coal was mined. It is metered to show whether the internal bearings are heating and the amount of air passing through at a given time. The various readings of air quality are taken in the mine at prescribed places and intervals, helping to determine the fan's operating condition.

¹⁴ Supporting the complaint about the fan, the employees on the second shift had not gone to work.

¹⁵ The men continued their refusal to enter the mine although Safety Director Holbrook returned to the mine and again checked out the ventilating system.

turned to the mine office, Grimmatt walked in, laughed, and told Hale that he was sick and was going home.

While the events concerning the fan were taking place, Hale had kept the Company's personnel relations manager, George Viers, informed. When Viers arrived at the mine, he wrote a request for Grimmatt's removal from the safety committee under a contract provision, described above, which gave the Employer the right to seek removal where a safety committeeman acted irresponsibly in closing down the mine. At Viers' request, the document was signed by Safety Director Holbrook and Hale.

Viers testified that on the day after the fan incident he and Holbrook met with members of the Mine No. 11 mine/safety committee, including the Respondent's president, Barker, and committee members Clyde Bartrum and Grimmatt.¹⁶ At the start of the meeting, the union representatives asked the company officials to drop the action against Grimmatt, which was refused. Grimmatt announced that the men just could not get along with Hale; he caused a lot of trouble. Bartrum agreed, repeating that the men could not get along with Hale and that the Company needed to replace him with Joe Montgomery, a Mine No. 11 foreman under Hale.

Grimatt's removal from the mine/safety committee went to arbitration on September 3, where Hale testified as one of the Company's witnesses. In mid-September, the arbitrator ruled that Grimmatt should be expelled, and Grimmatt later was notified of this by the Respondent's president, Barker.

Viers related that on September 28, soon after issuance of the arbitrator's award concerning Grimmatt, he and Holbrook again met with the mine/safety committee, including Grimmatt, who, by then, no longer was a member. The men demanded that Grimmatt be reinstated, and Bartrum again declared that Hale needed to be replaced as the men did not get along with him. Bartrum continued, "There never would be no work, no coal run down here as long as Mr. Hale was here," and repeated that the Company would continue to have bad relations as long as Hale was there. He again mentioned Joe Montgomery as a desirable replacement for Hale. During that meeting Bartrum recalled that, in February, an arbitrator had suspended him for 10 days and stated that the Company ought to give Hale 10 days off as well. Bartrum again declared that, if Joe Montgomery were put into Hale's place, there would not be any problems. However, he went on, as long as Hale was there, the men would call in the safety inspectors every time they get a chance.

According to Viers, Larry Mullins, one of the mine/safety committee members at the meeting, stated that he had worked with Hale at other mines, and that they had gotten along well and had never had any trouble. However, Mullins now expressed agreement with Bartrum that the men could not get along with Hale.

Viers told the committee members that the Employer was not going to replace Hale with Montgomery, and

that Hale would continue as mine foreman and would not be suspended.

Viers also described a communications meeting¹⁷ that he and Frank Holbrook attended on or about September 27 with members of the mine/safety committee. The mine/safety committee was represented at that meeting by Bartrum, Larry Mullins, and Edward (Butch) McDaniels. As production at Mine No. 11 was down, the company representatives raised that issue, also pointing out that the Company was receiving a disproportionately large number of grievances from employees at that mine.¹⁸ During the discussion, Bartrum reminded the company officials that he had told them they needed to get rid of Hale because the men were having a lot of trouble with him, and Mullins again agreed that the Company should replace Hale. Bartrum continued that Hale should be replaced by Joe Montgomery. He repeated that no one could get along with Hale, who did not do things right. If the men wanted to talk to Hale, he insisted on doing things his way, not theirs. Bartrum and the others were told that Hale was the mine foreman there, that he would continue to be so, and that discussion of his replacement was not a purpose of the meeting.

On October 2, under circumstances which will be described below, the Company placed 25 employees, including Bartrum, on 5 days' suspension with intent to discharge because of their refusal to enter past a certain point in the mine. That day, 22 first-shift employees and 3 second-shift employees who joined their protest were disciplined for refusal to work.

Viers testified that on October 4, 2 days after the above incident, he, Vice President Burl Holbrook, Safety Director Frank Holbrook, and Hale met with Emil Canterbury, United Mine Workers district field representative, the Respondent's president, Barker, Vice President Toller, and mine/safety committee members Bartrum, McDaniels, and Mullins. At the start of the meeting, Canterbury raised the issue of the discipline afforded the 25 employees resulting from the October 2 incident. Hale, as previously instructed by Viers, announced that the Company intended to go through with the suspensions subject to discharge. Bartrum declared that he had told the company representatives that there would be no production as long as Hale was there. When Bartrum then flexed his muscles and acted as though he was going to physically attack Hale, the company representatives left the meeting.¹⁹

¹⁷ Communications meetings are held quarterly between representatives of management and the different mine/safety committees, conducted separately with each committee, for purposes of resolving difficulties before they become serious. Matters such as improving production or the problems behind accumulating grievances might be discussed, with each side suggesting approaches.

¹⁸ Viers related that in September and the first part of October 40 grievances had been filed by the approximately 50 Mine No. 11 employees on various matters, including job postings, unit work performed by supervisors, and safety. By comparison, in the same period, the approximately 110 employees at the Company's three other mines had filed only 2 grievances.

¹⁹ Hale, too, confirmed that at an October meeting of company and union representatives, Bartrum had ripped off his shirt and started around the table after him.

¹⁶ As the Union was contesting Grimmatt's removal, under the contract, Grimmatt continued to serve until his status was decided by an arbitrator. Ouster from the safety committee also meant simultaneous removal from the mine committee.

Viers' above descriptions of efforts by mine/safety committee members, particularly Bartrum, to cause Hale's removal as mine foreman is only partially corroborated by other General Counsel witnesses. Accordingly, although Frank Holbrook recalled having been present at the September communications meeting, he testified that Bartrum had not been there and that he could not recall that anything had been said at the time concerning Hale. Frank Holbrook also did not confirm Viers' testimony that Bartrum, at various times in Holbrook's presence, had threatened that, unless Hale were removed or replaced, production would stop or be slowed or mine inspectors would be called in at every opportunity.

Frank Holbrook did relate that at a meeting he attended with Vice-President Holbrook, Viers, and mine committee members, called at the Respondent's request, Bartrum, who was among the committeemen present, had stood up as soon as the meeting came to an order and asked that Hale be fired. When Burl Holbrook refused, Bartrum stated that the men felt that Hale should be given a 10-day suspension. Burl Holbrook also refused this and the meeting came to an end.²⁰

Frank Holbrook described a casual conversation with Bartrum during a September visit to the mine. On that occasion, Bartrum told Holbrook that Hale was a primary problem to the mine and, if the Company got rid of Hale, then, maybe, the problems that the Company was having would be straightened out. Holbrook had not replied.

Frank Holbrook testified that on another occasion in September he was left alone in the Mine No. 11 office with mine/safety committee member Edward McDaniels. After some small talk, their conversation turned to difficulties at the mine, and Holbrook asked what the problem was there. McDaniels replied that the men were dissatisfied with Hale and, if Hale were replaced, conditions probably would straighten out.²¹

Bartrum, too, denied ever having told company officials that Hale should be removed, discharged, replaced, or suspended. He noted that he was not a member of mine management and the Company did not have to listen to him. Bartrum could not remember having said that operations at the mine would be slowed unless Hale were removed and denied having threatened to call in mine inspectors or, in fact, ever actually having called them. He could not remember the September communications meeting described by Viers.²²

²⁰ Frank Holbrook's account of this incident is corroborated by Burl Holbrook.

²¹ McDaniels denied ever having told Holbrook or any other company official that Hale should be discharged, protesting that he had worked for Hale in the past, that they had always gotten along well, and that he had high regard for Hale.

²² Committee member McDaniels also testified, as did Frank Holbrook, that Bartrum had not been at the September communications meeting, while the Respondent's president, Barker, related that Bartrum had not been a committee member in September and therefore could not have attended the meeting in that capacity. Barker's testimony in this regard, however, is contrary to a stipulation made earlier, in Barker's presence, that Bartrum had been a mine/safety committee member in February, September, and October.

Although Bartrum did not deny or otherwise refer to the October incident described by Viers and Hale where, in the presence of company and union representatives, he ripped off his shirt and appeared to be on the point of attacking Hale, this nonresponse was less interesting than the relevant testimony of the Respondent's president, Barker. Barker recalled that at a meeting in September Bartrum had taken off his shirt, announcing that it was getting hot, and had started to walk around. This had not been in answer to anything done or said by Hale. After Barker emerged from the meeting, he heard that a fight had taken place between Hale and Bartrum and had asked his informant what he was talking about as there had been no physical contact between the two men. On cross-examination, Barker blurred his earlier account by testifying that he had not known what the dispute was all about and that Bartrum, after unbuttoning his shirt, had moved in Hale's direction.

Barker related that a review of the Respondent's minutes of union meetings and his own notes and records showed no reference to Hale's discharge and that, in his presence, no member of the Union or of its committees had suggested to management that Hale be fired. Nonetheless, the record shows that Barker was extremely evasive when examined concerning whether Bartrum had told him of disputes with Hale, finally asserting he could not recall, and that he, personally, always had enjoyed a good relationship with Hale. Barker's extreme evasiveness and his testimony, noted above, that, contrary to stipulated evidence, Bartrum had not attended the September communications meeting because he was not then on the committee, and his descriptions of the incident where Bartrum removed his shirt, materially compromised his credibility. Accordingly, Barker's testimony is not credited.²³

2. The work stoppage

On October 2, shortly after the start of the first shift, Bartrum told Hale that the men would not go all the way into the mine until the mine top (roof) was repaired. Miners entering the mine that morning had refused to pass beyond an S-curve in a passageway situated approximately 600 feet past the portal (mine entrance), and had remained inside the mine, between the portal and the asserted trouble spot.²⁴

Hale tested the mine roof by striking at it with a hammer. He testified that he then asked Bartrum and the other men what they wanted as the roof had sounded solid and he did not see anything wrong with it. Hale re-

²³ Bartrum's testimony will be evaluated below.

²⁴ The top of Mine No. 11 was composed of shale and slate, which, unlike durable sandstone, can deteriorate rapidly. The mine then was about 20 years old, more than average in age, a factor which also could contribute to hazard. Accordingly, by mid-1980, there were problems with rotting support timbers, the condition of various roof areas, and clearance. During the preceding May, Hale had joined Barker in calling in mine inspectors who had closed operations until an area of the roof found to be an imminent danger had been repaired. Since August, other repairs had been made and steel supports installed. Before October 2, Hale had assigned three to four second-shift employees to work each night on the roof and, on the day before the work stoppage, Hale had marked off areas for repair. Work had started during the preceding night on the travelway, the passage route used by most miners.

minded the men that they had been traveling under the top just as it was for the last 7 or 8 years and that 100 mine inspectors also had passed under it. When the men replied that they wanted cribs built,²⁵ Hale assured them that this would be done and directed two of his foremen to, respectively, clear away the area to set the crib and to obtain the necessary materials from the lumberyard outside the mine.

The crib was put in place between 8:30 and 10 a.m. Frank Holbrook, who arrived at the mine while this effort was in progress, also checked the disputed roof area and pronounced it was safe.

According to Hale, after the crib was set up, he met inside the mine with committeemen Bartrum and Mullins. Bartrum announced that this was just the beginning. The men were going to have the entire mine fixed at that time, even over the belt line, and the travelway was going to be shut down.²⁶ Bartrum specified five places along the belt line and four places on the travelway in need of repair. Hale replied that he would have to make new arrangements, and went outside to check the idle day roster, which he denied actually having used.²⁷

While the work refusal continued, Hale consulted with Viers, Frank Holbrook, and state mine inspector Hobart Thompson.²⁸ As directed by Viers, Hale returned to the mine and informed the men gathered inside that the Company had done everything it could for the mine top and that the state mine inspector and the safety director both considered it safe. He directed the men to go to work, promising that repairs on the roof would be continued that night. When the men refused, Hale, also as instructed, told the men to leave the mine; they would receive 5-day suspensions with intent to discharge. Accordingly, the 22 first-shift employees who refused to go to their work areas, and 3 second-shift employees who joined their protest at 4 p.m. that day, were suspended with intent to discharge.²⁹

As noted, it was at a meeting between company and mine/safety committee officials following this work stoppage and disciplinary action when, as described above, Bartrum assertedly removed his shirt and appeared ready to attack Hale.

On October 6, 4 days after the incident, Federal inspectors from the Mine Health and Safety Administration inspected the mine. It is stipulated by the parties that, as a result of this inspection, 14 citations were issued to the Company for various violations, including

²⁵ Cribs are sawed blocks used to support the roof.

²⁶ The mine has two entryways. The great majority of miners went to and from the face in cars (buses) which moved over track. This route was called the travelway. The second entryway was for the conveyor belt used to transport coal from the mine. The belt line was attended along its length on each shift by several employees with responsibility for its operation and maintenance.

²⁷ The idle day roster is a list of employees who are unable to work when the mine is totally or partially idled for need of safety repairs. It is used to apportion available work among such employees. The presence of an idle day roster indicates that the mine is not under full production for safety reasons.

²⁸ Thompson, who arrived at the mine about 2 hours after the work refusal began, having been summoned by Frank Holbrook, did not issue citations, or notices of violation, that day but did recommend to Frank Holbrook that additional roof supports be installed.

²⁹ Viers, who wrote out the disciplinary notices, acted on authorization from Vice President Burl Holbrook.

problems with roof control, fire suppression, and electrical hazards. Three of the citations specifically related to roof control. Frank Holbrook testified that, although the Federal mine inspectors did not issue a closure order, the Company, upon receiving the citations, decided not to wait for such an order and, on its own initiative, closed the mine to undertake the indicated repairs. The mine was shut down for about 3 weeks while this work continued. Safety Director Holbrook could not recall whether any of the citations issued related to the disputed section of the roof under which the men refused to pass on October 2. However, the arbitrator, in his award concerning the 25 grievants of the October 2 discipline, noted that state mine inspector Thompson had returned to the mine on October 6, the same day the Federal inspectors were present, and issued a citation that the roof over the S-curve had not been adequately supported.

The matter of the discipline afforded to the 25 men on October 2 went to arbitration on October 8. That day, after hearing evidence and arguments, the arbitrator, from the bench, ordered the reinstatement of the 25 suspended grievants, but reserved decision on the demand for back wages pending further study.³⁰

In his written award, dated November 24, the arbitrator reaffirmed his bench decision to reinstate all 25 grievants without loss of seniority rights, and directed that the remaining 24 grievants be paid for 2 of the 4 workdays the mine would have produced coal after their suspension.³¹ The 4 regular workdays upon which the arbitrator based backpay were those days following the October 2 day of suspension that the mine remained open before being closed for 3 weeks of repairs.

3. Hale's discharge

On October 31, Hale received notice from Vice President Burl Holbrook that he was being terminated. Hale testified that that day he was called to Holbrook's office where the latter told him that he had to do something he hated. Holbrook continued that Hale should not ask him why as he had no reason to give; he had walked the floor for 2 nights. Holbrook then gave Hale his check

³⁰ In actuality, the arbitrator had reserved ruling on the backpay entitlement of only 24 of the grievants, having found that 1 of the original 25, an electrician, had not been involved in the events of October 2. Accordingly, the electrician was immediately returned to work with full backpay. Also, the arbitrator found that it had been the personnel on the second bus, carrying a section foreman and 13 crewmembers, who had refused to pass the S-curve on October 2. The first bus, bearing a section foreman and eight crewmembers, earlier had passed the alleged bad top area to a distance of around 1,800 feet before learning on the radio of the controversy concerning the top, at which time the first bus returned.

³¹ In so finding, the arbitrator concluded that the Employer had not successfully met its burden of proving that the employees lacked good faith or reasonable grounds to believe that the S-curve area on October 2 had been dangerous beyond the normal hazards. The arbitrator found, among other things, that, although state inspector Thompson had stated on October 2 that the S-curve posed no "imminent danger" and that "it was highly doubtful that the evidence was . . . strong enough to declare that a truly abnormal hazard confronted the employees at the time," the employees also had had a right to rely on Thompson's admonition that the top be made safe before the employees go to work. Hence, the employees were held to have had a good-faith belief that the existing danger was abnormal and no just cause was found for suspension and discharge. The arbitrator also noted, as discussed, that a few days later Thompson returned and cited the S-curve area as violative.

and advised him to sign up for unemployment or to hunt for another job. When Hale asked if he was being terminated for having discharged the men, Holbrook denied this and took full responsibility. The two men shook hands and, as Hale left, he was advised to return in mid-November to pick up his check for the 2 weeks' pay still due.³²

Burl Holbrook's recollection of the events leading to Hale's discharge were less sentimental. Holbrook related that he had been ordered to go to Italy around October 10 and meet with the Company's board of directors and president, Herman Zmoelnig. There, he reported to Zmoelnig concerning all company operations, including the events at Mine No. 11.

Zmoelnig questioned Holbrook closely, asking why the discharge arbitration at Mine No. 11 had been lost. Zmoelnig had been upset that it might be necessary to give the 25 employees backpay. Holbrook explained to Zmoelnig that he had not been given all the facts before authorizing the suspensions with intent to discharge. Holbrook, for instance, had not known of the existence of an idle day roster on October 2 and that safety work on the mine roof had not been completed before he had given the order to discharge the men.³³ Instead, he had been told by Hale that all such repairs had been completed by October 1 and had authorized action based on that information. Having, by such misinformation, ordered the men to work over their objection while roof repairs still were underway, Holbrook reported that the Company had been put in an untenable position.

During their meeting, in response to questions by Zmoelnig, Holbrook related that labor relations had become worse at Mine No. 11 and that it would be necessary to take action. He described the Union's earlier requests that Hale be removed as mine foreman, and threats made as to what would occur if he were not, and suggested that Mine No. 11 be closed down because of the labor situation and the numerous complaints concerning safety.³⁴

Zmoelnig authorized Holbrook to do whatever he thought necessary and, following his discussion with Zmoelnig, Holbrook requested Hale's resignation.

C. Discussion and Findings

Section 8(b)(1)(B) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Threats to an employer that a job will be shut down or that production would be cut back by various means, including warnings that mine inspectors would be called in at every opportunity or

that employee relations would remain troubled, unless the employer complies with the Union's demand to remove a supervisor from the workplace are obvious forms of statutory coercion.³⁵ Here, it is clear that Hale, as mine foreman, did represent the Company in the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

The Respondent, however, denies that its agents, members of the mine/safety committee, had made the charged demands and threats to coerce the Company into removing Hale.

However, the Respondent's relationship with the Company at Mine No. 11 during the relevant period was markedly confrontational. Even the arbitrator, in returning the 25 grievants to work, noted that the workmen exhibited "a harassing attitude toward the employer." It is in this atmosphere that the conduct attributed to the Union must be judged.

Hale had become Mine No. 11 foreman in the first place when, in the context of poor productivity and continuing labor disputes, the physical threat by Bartrum, and the demand for his removal by Barker, the Company had found it advisable to transfer Browning from that position. Hale also had been transferred to the much larger Mine No. 11 because of his experience, his leadership in production, and his ability to avoid labor disputes. Hale's earlier good rapport is not disputed and, for some months after he took over, production at Mine No. 11 materially increased.

Yet, immediately after Hale's role in the removal of Roy Grimm from the mine/safety committee, members of that committee, spearheaded by Bartrum, began to demand Hale's replacement. As with Browning, the stated given reason was that the men could not get along with him. I do not credit Bartrum's denials of the demands and threats to secure Hale's removal attributed to him by the General Counsel's witnesses.³⁶ Although Frank Holbrook did not fully corroborate all of Bartrum's activities as described by Viers, Holbrook did testify as to demands for Hale's removal by Bartrum and committee member McDaniels, the latter also indicating that such action was necessary to end problems at the mine. Both Burl Holbrook and Frank Holbrook corroborated Viers' testimony that Bartrum had demanded that Hale, too, be suspended for 10 days. The demands and threats made by the union representatives, therefore, were not only largely corroborated but also were descriptive of what then was occurring at the mine. Production had plunged to what it had been before Hale's transfer to the mine and, although the Mine No. 11 employees made up only about 45 percent of the Company's mine-employed personnel, from September to the first part of October their filed grievances exceeded in number those filed by all the other mine employees by a ratio of 20-to-1.

³² On October 31 and November 1, Viers and Foreman Joe Montgomery also were discharged by Burl Holbrook. Viers' testimony that he was told at his exit interview that his job was being terminated because the board of directors had decided to cut cost was uncontradicted. No reason was given for the concurrent discharge of Montgomery as section foreman of Mine No. 11, or of a third individual, an employee of that mine, who also was terminated at the same time.

³³ Holbrook first had learned of the idle day roster when Hale testified at the arbitration hearing that he had had such a document on October 2.

³⁴ As noted, the mine finally did close on March 25, 1981, upon the expiration of the collective-bargaining agreement.

³⁵ *Laborers Local 423 (Mansfield Flooring)*, 195 NLRB 241 (1972); *Union Independiente de Empleados de Servicios Legales (Corporacion de Servicios Legales)*, 249 NLRB 1044, 1052 (1980).

³⁶ Committee member Mullins, also charged with twice having demanded Hale's removal, did not testify.

By repeatedly demanding Hale's removal as Mine No. 11 foreman and by threatening continued action harmful to the Company if these demands were not met, the Respondent clearly exceeded any legitimate course of action, and its activities served to deny the Employer of its choice of a supervisory representative. Section 8(b)(1)(B) of the Act clearly proscribes the use of coercive tactics for such an objective.

Contrary to the General Counsel, however, I do not find the October 2 refusal by 25 union members to enter the mine to be a part of the unlawful campaign to remove Hale. Conditions at the mine when this incident occurred were demonstrably dangerous. Within a few days thereafter, Federal inspectors had cited 14 unlawful conditions, and the record shows that, on the same day that the Federal citations issued, the state mine inspector, Thompson, issued a citation specifically with respect to the controversial S-curve top. As a result of these citations, and in anticipation of a closure order, the Company closed the mine for 3 weeks on its own initiative to make the needed repairs.

The age of Mine No. 11, its construction in certain areas, the problems of decaying support timbers, the composition of the slate and shale roof, which was subject to collapse with or without warning, and previous safety concerns made clear that constant vigilance was required to ensure safety. Vice President Holbrook testified, in effect, that he would not have ordered the men to work on October 2 on the risk of discipline had he known of the existence of the idle day roster signifying that repairs were then in progress. In the context of the mine's inherent dangers, the repairs then in progress, and the violations found at the mine after the work stoppage, including the disputed S-curve area, necessitating a 3-week closure period for repairs, I find that the work refusal on October 2 was based on safety considerations and would have occurred even in the absence of the Respondent's recognized hostility to Hale. On these facts, I cannot seek to establish a precedent which would require employees so situated to work at their peril.³⁷

It having been found that the work refusal was predicated upon lawful safety concerns, the issue remains as to whether the other conduct by the Respondent's representatives found violative here was sufficient to warrant a conclusion that the Respondent was responsible for Hale's termination.

The reasons for Hale's discharge were given by Burl Holbrook who testified that, in the aftermath of the October 2 work refusal, he had been obliged to report, in Italy, to the Company's president, Zmoelnig, as to why the arbitrator had not upheld the Company's efforts to discharge the 25 men. This had brought Hale to management's attention with an emphasis that might not otherwise have applied. Holbrook found it necessary to explain that he had authorized the disciplinary action

³⁷ The decision by the men to refuse to work on October 2 appears more to have been spontaneous than preplanned. As found by the arbitrator, and not otherwise contradicted, the first bus carrying the workers into the mine that day had passed well beyond the disputed S-curve area, returning only when notified by radio of the refusal by the men in the second bus to go through that area. Although the roof over the S-curve was the immediate proximate cause, Hale testified that the men were concerned about the repair of other areas as well.

should the men refuse to enter the mine because Hale had not advised him that roof repairs were still in progress and that an idle day roster had been required. Such misinformation or omissions in reporting by Hale³⁸ could not have enhanced his status and may have furnished reasons for discharge not imputable to the Respondent.

However, other factors also were described by Holbrook to Zmoelnig, including the numerous labor disputes at Mine No. 11, the demands by the Respondent's representatives for Hale's removal, and the threats of harmful action, both new and continuing, were Hale allowed to remain. Considerations of relapsed production and proliferating grievances, too, were behind Holbrook's recommendation to Zmoelnig that the mine be closed. Earlier, a less aggravated situation marked by fewer demands and threats and with no work refusal had resulted in the transfer of Browning.

By its actions, the Respondent neutralized Hale's earlier record for effective productivity and labor rapport and, without reference to the events of October 2, had made him an economic liability. Historically, at least from Browning's experience, such a burden had been unacceptable to the Company. Clearly, the Respondent expended considerable effort in its campaign to oust Hale. Its ultimate success in this undertaking merits recognition.³⁹

In view of the above, I find that the Respondent violated Section 8(b)(1)(B) of the Act by:

- (a) Repeatedly demanding Hale's discharge, removal, or suspension.
- (b) Threatening actions harmful to the Company if such demands were not met, including cessation of production, slowdown, continued work troubles, and harassment by mine inspectors.
- (c) Coercively slowing production.⁴⁰
- (d) Causing Hale's discharge.⁴¹

³⁸ Hale did not deny this testimony by Burl Holbrook.

³⁹ As the complaint did not allege the Respondent's concurrent attempt to coerce the Company into naming Joe Montgomery as Hale's successor at Mine No. 11 as a further violation of Sec. 8(b)(1)(B) of the Act, and as the matter was not litigated at the hearing, no finding is made in this regard.

⁴⁰ Although actual, rather than threatened, production slowdown was not alleged as violative in the complaint, the matter is intrinsically related to matters alleged and was litigated at the hearing.

⁴¹ In concluding that the Respondent unlawfully caused Hale's discharge without relation to the events of October 2, no reliance is placed on the General Counsel's argument that, in the event of such a finding, *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), would not be applicable under Sec. 8(b)(1)(B) and that the Respondent could be held responsible for the discharge as having "in part" brought it about by its other unlawful conduct. *Wright Line*, which ended the "in part" test in mixed-motive discrimination cases arising under Sec. 8(a)(1) and (3) of the Act, had the practical effect of increasing the General Counsel's burden by requiring an evidentiary preponderance sufficient to overcome any showing by a respondent that the disputed action still would have occurred for other, lawful reasons. To accept the General Counsel's premise in this regard would be to create inconsistent burdens of proof in matters involving mixed motives with a result that it might be simpler for the General Counsel using an "in part" theory to protect the rights of supervisors under Sec. 8(b)(1)(B) than of employees under Sec. 8(a)(1) and (3), where the "in part" test long has been abandoned. Nothing in Board doctrine suggests such an intent. In the present matter, it has been concluded that, although Hale had compromised his position with

Continued

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. United Mine Workers of America, Local Union No. 8217, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Powellton Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By causing and obtaining the Employer's discharge of Ernest T. Hale as its collective-bargaining and grievance adjustment representative by means of repeated demands for Hale's discharge, removal, or suspension, supported by threats of production shutdown and slowdown, continued work problems, and harassment by mine inspectors, and by actually slowing production, the

the Company by not having correctly notified Burl Holbrook that repairs still were in progress, and of the idle day roster, before Holbrook ordered the men to work on penalty of discharge, the Respondent's other unlawful conduct found herein still would have caused the Company to remove him. As compared to Browning's transfer, Hale's discharge was proportionate to the Union's more severe campaign against him.

Respondent restrained and coerced the Employer in violation of Section 8(b)(1)(B) of the Act.

4. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

As the Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, that it take certain affirmative action designed to effectuate the policies of the Act, and that it refrain from engaging in any like or related conduct.

As it appears that Hale may have suffered loss of earnings as a result of the Respondent's unlawful conduct, the Respondent should be required to make him whole therefor, with interest to be computed in the manner prescribed by *Florida Steel Corp.*,⁴² from his October 31, 1980, discharge date through March 25, 1981, when Mine No. 11 was closed. The Respondent, through its officials, should also be required to notify the Company, in writing, that it has no objection to the Company reemploying Hale in the capacity formerly held by him at any present or future mining facility it may operate. A copy of such correspondence should be concurrently served by the Respondent upon Hale.

[Recommended Order omitted from publication.]

⁴² 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).